

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**OHIO VALLEY ENVIRONMENTAL
COALITION, WEST VIRGINIA
HIGHLANDS CONSERVANCY, and
SIERRA CLUB,**

Plaintiffs,

v.

**AUSTIN CAPERTON, Secretary,
West Virginia Department of
Environmental Protection,**

Defendant.

CIVIL ACTION NO. 3:20-cv-00470

MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant, Austin Caperton, Secretary of the West Virginia Department of Environmental Protection ("DEP"), moves to dismiss the Complaint of Plaintiffs Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, and Sierra Club on the basis of *res judicata*, and for lack of subject matter jurisdiction and for failure to state a claim under to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) because Eleventh Amendment sovereign immunity bars Plaintiffs' claims against the DEP under the holding of the seminal case, *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

Further, DEP seeks to dismiss Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs have failed to establish the existence of a justiciable case or controversy with regards to the DEP under Article III of the Constitution. Specifically, Plaintiffs lack standing to prosecute their claims and their claims are not ripe for adjudication. Accordingly, DEP requests that this Court dismiss Plaintiffs' Complaint in its entirety.

Dated: August 12, 2020

/s/ Kevin W. Barrett

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CERTIFICATE OF SERVICE

I, Kevin W. Barrett, do hereby certify that on August 12, 2020, I electronically filed the foregoing “**Motion to Dismiss Plaintiffs’ Complaint**” with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

J. Michael Becher, Esquire
Derek Teaney, Esquire
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/s/ Kevin W. Barrett

Kevin W. Barrett (WVSB #13569)